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Daniel J. Armstrong, Jared Armstrong, Taylor Armstrong by Lorene Armstrong, his guardian ad litem v. Glen C. Pickett and John Does 1-5: Brief of Appellee

Utah Court of Appeals

IN THE SUPREME COURT OF UTAH

DANIEL J. ARMSTRONG, JARED ARMSTRONG, TAYLOR ARMSTRONG BY LORENE ARMSTRONG, his guardian ad litem, Plaintiffs/Appellees, vs. GLEN C. PICKETT and JOHN DOES 1-5, Defendant/Appellant.	SUPREME COURT CASE No. 20010167 Civil No. 980908711 Judge Homer Wilkinson ORAL ARGUMENT REQUESTED

APPELLEES' BRIEF

APPEAL FROM JUDGMENT OF THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY, JUDGE HOMER WILKINSON

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JURISDICTIONAL STATEMENT

Appellees (Armstrongs) concur with Appellant (Pickett) that this court has jurisdiction over this matter pursuant to Utah Code Anno. 78-2-2(3) and Utah Const. Art VIII, §§ 1 and 3.

STATEMENT OF THE ISSUES

Armstrongs concur that Pickett has raised the five issues stated in his brief. Armstrongs ask the court to address two additional issues. They are, 1) whether Pickett properly preserved his issues before the trial court, and 2) whether opposing counsel may proceed on behalf of Pickett without showing authority to do so. Because both of these issues were raised before this court this court will be the only court to determine whether the Armstrongs assertions are correct. The standard this court should use in considering these issues is "correctness," *State v. Pena*, 869 P.2d 932, 936 (Utah 1994), i.e. is Armstrongs' position on these issues correct.

DETERMINATIVE LAW

41-12a-304. No-fault tort immunity ineffective.

> The owner of a motor vehicle on which owner's or operator's security is required under Section 41-12a-301 who fails to have the security in effect at the time of an accident does not have immunity from tort liability under Subsection 31A-22-309(1). This owner is personally liable for the payment of the benefits provided for under Section 31A-22-307 to persons entitled to receive them under Section 31A-22-308.

STATEMENT OF THE CASE

Nature of the Case

This is a negligence claim. Pickett ran a stop sign while intoxicated, injured the Armstrongs and totaled their vehicle. They sued to recover their damages.

Course of Proceedings

After Armstrongs filed suit they were unable to locate Pickett and obtained an order from the court allowing service by mail. Counsel answered for Pickett. When Pickett refused to appear for his deposition Armstrongs filed a motion to compel and then a motion for sanctions. Each was granted. As a result of the motion for sanctions Pickett's pleadings were stricken. The matter was then tried to the court on damages. Armstrongs were awarded judgments for their personal injuries and property damage. Pickett appealed.

Disposition at Trial Court

The matter was tried to the court on damages. The trial court awarded special, general and punitive damages. Pickett objected to some proposed findings of fact in general but not with specific citations to the exhibits, the transcript or the law. Those objections were not noticed for consideration by the trial court and the findings of fact, conclusions of law and judgment proposed by Armstrongs were entered.

RELEVANT FACTS WITH CITATION TO THE RECORD

On January 7, 1996 Pickett, driving his Chevrolet Suburban, struck the Armstrongs' Suburban. (Appendix at Tab A, bate stamp no. 1, 4). Pickett was arrested and charged with driving under the influence. (Appendix at Tab A, bate stamp no. 5, 14). At the scene of the collision Pickett could not stand, even with the help of witnesses. (Appendix at Tab A, bate stamp no. 8). Pickett's blood alcohol was between .12 and .14. (Record at 578, page/line 26/19).

At the time of the Pickett collision Dan Armstrong was 41. (Appendix at Tab a, bate stamp no. 1). In the collision Dan Armstrong was struck in the lower back. (Record at 578, page/line 30/22-24). Dan Armstrong had suffered an injury to his back in a prior motor vehicle accident. (Record at 578, page/line 31/25-32/2). The injury to his back was exacerbated by the collision at issue in this case. As a result of the prior injury Dan usually woke up between 3:30 a.m. to 4:00 a.m. After the Pickett collision he woke up at 2:00 a.m, the pain lasted longer and was more frequent. (Record at 578, page/line 31/17). Before the Pickett collision Dan need to exercise 2-3 times a week to resolve the pain in his back. (Record at 578, page/line 32/15). Since the Pickett collision Dan has to do the exercises everyday and his back still flares up. (Record at 578, page/line 33/18).

Further, Dan now has to do additional exercises to keep the pain in his back under control. (Record at 578, page/line 34/6). If Dan doesn't do the exercises he has severe pain which he attributes to the accident. (Record at 578, page/line 34/17). Since the Pickett collision Mr. Armstrong has to get up and move around after sitting for one and a half to two hours. He didn't have to get up and move around before the Pickett collision. (Record at 578, page/line 35/12). Over all Dan can't do the things he does as well as he did before the collision. (Record at 578, page/line 35/18). Mr. Armstrong was referred for an MRI by his family physician, Scott Smith, for complaints of lower back pain. That scan was performed November 18, 1997. (Appendix at Tab D, bate stamp no. 104; Tab E, bate stamp no. 110). As a result of his back problems his chiropractor recommended that Dan get an orthopedic chair. (Appendix at exhibit 5.) Dan's total medical expenses arising from the Pickett collision were at least $3823.00. (Appendix at exhibit 3).

At the time of the Pickett collision Jared Armstrong was 15. (Appendix at Tab A, bate stamp no. 1). In the collision Jared Armstrong's face was cut. (Record at 578, page/line 31/3). Jared underwent plastic surgery in an attempt to remove those scars. (Appendix at Tab F, bate stamp no. 135-140, 180-185). A photograph of Jared's scars, after the surgery, was admitted at

trial and shows that they remain. (Appendix at Tab F, bate stamp no. 148). Jared's scars are noticed by other people. (Record at 578, page/line 73/18). Jared incurred medical expenses of at least $2778.78 as a result of the Pickett collision. (Appendix at exhibit 4).

At the time of the Pickett collision Taylor Armstrong was 6. (Appendix at Tab A, bate stamp no. 1). In the collision Taylor struck his head and lost consciousness. (Appendix at Tab H, bate stamp no. 217, 222). After the collision Taylor's parents became concerned about him. Taylor used to run but didn't after the accident. He forgot his "ABCs" and reading became a chore. (Record at 578, page/line 36/14). Taylor's parents noticed that his eye-hand coordination was off and that Taylor had to think about running. (Record at 578, page/line 37/21). He also has trouble kicking and throwing a ball. (Record at 578, page/line 38/12). The Armstrongs have had to work constantly with Taylor on his reading. They read with him in the morning before he goes to school to "get him started". (Record at 578, page/line 37/1). Taylor has seven siblings. (Record at 578, page/line 66/7). His parents have been involved in the education of all their children but they have to work a lot harder with Taylor. (Record at 578, page/line 66/17). Taylor is behind his siblings in school work. (Record at 578, page/line 37/15). He has to work a lot harder

than his siblings do at school work. (Record at 578, page/line 66/17). In July of 1999 the Armstrong's consulted Dr. Erin Bigler, a neuropsychologist. (Record at 578, page/line 57/23).

Dr. Bigler tested and examined Taylor on June 27th and July 9th of 1999. (Appendix at Tab M, bate stamp no. 470). Dr. Bigler testified that a positive loss of consciousness, like that Taylor sustained, is definitive for brain injury. (Record at 578, page/line 78/11). Forgetting one's ABCs is a common difficulty in children with brain injury. (Record at 578, page/line 78/19). Continuing to experience problems three and one half half years after the accident indicates there are residual effects of the head injury. (Record at 578, page/line 79/6). The tests indicate Taylor suffers a left hemisphere brain injury which effects his language. (Record at 578, page/line 70/10). Taylor's verbal IQ was 89 but his performance IQ was 108, a 19 point difference which is beyond the standard deviation and statistically different than what you would expect to see. (Record at 578, page/line 79/20). The statistical difference in conjunction with the testing performance suggests the left hemisphere brain injury. (Record at 578, page/line 80/6). Taylor took the Peabody Picture Vocabulary Test and scored considerably above average. This with the other tests show that Taylor's problem is with reading, spelling & verbal analytical processing

and not visual verbal processing. (Record at 578, page/line 81/8). Taylor also took the Wide Range Achievement Test which showed that Taylor is behind in reading and spelling. (Record at 578, page/line 81/24). The result is that Taylor has a difference in his visual memory and verbal memory. (Record at 578, page/line 82/4). Dr. Bigler's opinion is that Taylor suffered a verbal learning loss as a consequence of the head injury. There may be permanency to the deficit and he may not get back to the previous potential. (Record at 578, page/line 82/18). If the problems persist he will not be successful in college and likely will not be able to pursue a variety of technical jobs in positions which will require complex verbal processing, reading, spelling, critical writing. The injury will dictate the kinds of jobs he can pursue. (Record at 578, page/line 82/25). It is more probable than not that Taylor's problems will continue. (Record at 578, page/line 83/10).

People with Taylor's problems experience a higher frequency of neuropsychiatric problems like depression, heightened anxiety, and stress disorders. (Record at 578, page/line 83/19). There is also an increased risk for learning disabilities and learning problems. People with problems like Taylor's also have a tendency to be more impulsive, have problems with judgment & ability to sustain attention and concentration. (Record at 578, page/line

84/1). The testing showed problems verbal abilities. Reading, spelling vocabulary use and verbal comprehension were all down from his high average to superior rating in non-verbal abilities (Record at 578, page/line 84/24). Because of the problems associated with his injury Taylor will probably earn less income over his life than he would have had he not been injured. (Record at 578, page/line 85/16). Taylor may work around some of the problems but he will still not compete on a level with his peers. (Record at 578, page/line 85/17). Taylor's injury is, more probably than not, a permanent impairment. (Record at 578, page/line 86/1). The fact that he can compensate doesn't mean Taylor is not impaired. (Record at 578, page/line 86/2). Taylor's injury is a classic minor traumatic brain injury. You can have minor problems with monumental difficulties. (Record at 578, page/line 86/19). People like Taylor may get somewhat better, they usually do and then have an absolute leveling off where a plateau is reached which is insurmountable thereafter. (Record at 578, page/line 89/2). Taylor's medical expenses associated with the Pickett collision were at least $7147.83. (Appendix, exhibit five).

As a result of the collision the Armstrong vehicle, a 1992 Suburban, was a total loss. (Appendix at Tab J, bate stamp no. 274). Pickett claims that Armstrongs may not recover for this

loss because that claim was asserted by Dan Armstrong though the vehicle was titled to his wife, Appellant Lorene Armstrong. In fact Pickett's insurance company had already paid Appellant Dan Armstrong, on behalf of Pickett, part of the value of the vehicle by a check made payable to Dan Armstrong. (Appendix at Tab J, bate stamp no. 274). The other evidence pertaining to the vehicle showed that it was Dan Armstrong who paid for the add on items which increased the value of the vehicle and which were also lost in the collision. (Appendix at Tab J, bate stamp no. 286 and at Tab X).

SUMMARY OF ARGUMENT

This matter was tried to the trial court. Appellate courts grant trial courts substantial discretion in such matters. Though Pickett objected to numerous proposed findings of fact those objections were not submitted for decision so the trial court did not have the opportunity to rule on them.

Once Pickett's pleadings had been stricken and his default entered Armstrongs were entitled to recover whatever damages the evidence established. In particular, Utah's no-fault automobile insurance statute is an affirmative defense which was stricken with the rest of Pickett's pleadings. Even if the court finds that the no-fault statute is not an affirmative defense there is sufficient evidence to support the judgment based upon the

injuries suffered by each of the Armstrongs.

ARGUMENT

I

THE APPELLATE STANDARD ON EVIDENTIARY RULINGS

A trial court's evidentiary rulings are subject to an of discretion standard. *Harline v. Barker*, 912 P.2d 433, 441 (Utah 1996). Even if a court's evidentiary ruling is in error it will not be reversed on appeal unless the error is harmful. *Jouflas v. Fox Television Stations, Inc.*, 927 P.2d 170, 173 (Utah 1996). Harmful error occurs where the likelihood of a different outcome in the absence of the error is sufficiently high so as to undermine confidence in the verdict. *State v. Knight*, 734 P.2d 913, 920 (Utah 1987). This standard has also been described as clear error. *State v. Gamblin*, 2000 UT 44, P17 n.2, 1 P.3d 1108. Applying this standard to the facts of this case this court must affirm the judgments of the trial court.

II

PICKETT'S POINTS OF ERROR WERE NOT PRESERVED FOR APPEAL

In his brief Pickett summarily concludes that his points on appeal were preserved for appeal by citing to various pages in the record where the issue was supposedly addressed. Pickett's terse discussion of these issues does not mean they were properly preserved for appeal. At the conclusion of trial proposed

findings of fact were submitted for the trial court's consideration. Pickett responded with an objection to 18 of those findings. (Record at 567). The text of that Objection, comprising a single page, merely listed the numbered paragraphs to which Pickett objected but provided no factual or legal basis for the objections. Further, despite the existence of Rule 4-504, Utah Code Jud. Admin., which requires Pickett to advise the clerk to submit the objection to the trial court for consideration, no Notice to Submit for Decision was submitted.

Pickett's terse objections do not meet the standard Utah courts require when a party seeks to preserve an issue for appeal. Before a party may advance an issue on appeal, the record must clearly show that it was timely presented to the trial court in a manner sufficient to obtain a ruling thereon." *Salt Lake County v. Carlston*, 776 P.2d 653, 655 (Utah Ct. App. 1989); see also *Hart v. Salt Lake County Comm'n*, 945 P.2d 125, 129 (Utah Ct. App. 1997) ("'"A matter is sufficiently raised if it is submitted to the trial court, and the court is afforded an opportunity to rule on the issue."'"). Moreover, the party must specifically raise the issue, such that it is brought "to a 'level of consciousness' before the trial court." *Hart*, 945 P.2d at 130 (quoting *James v. Preston*, 746 P.2d 799, 802 (Utah Ct. App. 1987)). This requirement "serves the interests of judicial

economy and orderly procedure" by not only giving the trial court a chance to correct error, but by making the parties "crystallize issues prior to appeal." *State v. Sixteen Thousand Dollars U.S. Currency*, 914 P.2d 1176, 1179 (Utah Ct. App. 1996). When issues are not brought to the trial court's attention in a timely manner, they are "deemed waived, precluding the appellate court from considering their merits on appeal." *Carlston*, 776 P.2d at 655. Pickett's objection to the findings, without allowing the trial court to consider them, do not meet this standard.

This case is also legally akin to *Evans v. State*, 963 P.2d 177 (Utah 1998). There the court cited Rule 4-502(2), Utah Code Jud. Admin., and held that a party was bound by an order to which it did not object. Here Pickett's objections were completely unsupported and cannot form the basis for preserving issues on appeal.

Each of the points Pickett asserts on appeal was addressed in one of his Objections to Armstrong's Proposed Findings of Fact and Conclusions of Law. (Record at 567). Pickett's issue one is whether Dan Armstrong may recover for damage to his vehicle which happened to be titled in his wife's name. That factual issue is contained in the Findings at paragraph 11, record at 552, objected to by Pickett, without background or support. (Record at 567).

Pickett's issue two is whether Dan Armstrong and Jared Armstrong may recover for damages which Pickett claims do not meet the no-fault threshold. That factual issue is implicit in the Findings at paragraphs 6, 8, 9, 10, 25, 44, 44, and 45, record at 552-556, objected to by Pickett, without background or support. (Record at 567).

Pickett's issue three is whether Dan Armstrong's prior back injury was aggravated by the collision. That factual issue is contained in the Findings at paragraph 5, record at 552. It was objected to by Pickett, without background or support. (Record at 567).

Pickett's issue four is whether the scaring of Jared Armstrong is permanent, allowing him to recover in the face of Utah's no-fault statute. That factual issue is contained in the Findings at paragraphs 25 and 45, record at 554 and 556. It was objected to by Pickett, without background or support. (Record at 567).

Pickett's issue five is whether the closed head brain injury suffered by Taylor Armstrong supports the damages the trial court awarded. That factual issue is contained in the Findings at paragraph 25-27, 30, 37, 39, 42, 43, and 46, record at 554-556, objected to by Pickett, without background or support. (Record at 567).

While Pickett may have discussed these issues tangentially at times during the trial nothing in the record indicates they were adequately presented so as to be brought "to a 'level of consciousness' before the trial court." *Hart*, 945 P.2d at 130. Between the court's file, the transcript of the trial and the exhibits the record in this matter approaches 1500 pages. Pickett's brief comments are not sufficient to preserve the issues for trial in light of his complete failure to allow the trial court to focus on them succinctly as it could have had the objections to the Findings of Fact been supported and noticed.

III

PICKETT WAS DEFAULTED AND ARMSTRONGS WERE ENTITLED TO ALL DAMAGES AWARDED

Pickett argues that Appellants Dan Armstrong and Jared Armstrong are not entitled to recover because their claims are barred by no-fault even though Pickett's pleadings, including all his defenses, were stricken. They are in error.

Utah law on the effect of a default is long standing.

> A default on which a judgment may be rendered is **an admission of every traversable allegation of the declaration or complaint** necessary to plaintiff's cause of action, also, that defendant is the person named in the writ and intended to be served, and that the court has acquired jurisdiction of his person, and has jurisdiction of the cause of action, and also constitutes an admission of the due execution of the instrument sued on. *Utah Ass'n of Credit Men v. Bowman,*

38 Utah 326, 113 P. 63 (Utah 1911). [emphasis added]

Pickett was entitled to, and did, plead a defense derived from Utah's no-fault automobile insurance statute. That defense, along with all others, was stricken when the court entered its order striking his pleadings for his failure to participate in discovery.

Pickett correctly quotes Utah Code Anno. 31A-22-309(1)(a)-(e). However Pickett has ignored that section's companion provision of the code. Utah Code Anno. 41-12a-304 provides, "[t]he owner of a motor vehicle on which owner's or operator's security is required under Section 41-12a-301 who fails to have the security in effect at the time of an accident does not have immunity from tort liability under Subsection 31A-22-309(1)." This court has previously held that this language literally means what it says. See *Allstate Ins. Co. v. Ivie*, 606 P.2d 1197, 1200 (Utah 1980).

The result si that Pickett could fall into one of two groups. He could be properly insured and have tort immunity or he could be uninsured and not have immunity. That status, and the immunity associated with it, constituted an affirmative defense which was pled but was lost when Pickett's pleadings were stricken. Had Pickett appeared pro se or with counsel who had failed to plead the no-fault defense Armstrongs would have been

allowed to obtain judgment for all damages they sustained. After Pickett's pleadings were stricken he was in exactly that position.

Pickett argues that holding that his insured status is an affirmative defense rather than jurisdictional and will in some fashion open the flood gates of unsanctioned litigation. That argument rings hollow. Those who have insurance and are sued know to take claims asserted against them to their insurance adjustors for defense by their carrier's hired counsel, like Pickett did. It is only the irresponsible who fail to maintain insurance, or who fail to participate in discovery, who should have any concern. The fact that this is a case of first impression shows there is no reasonable concern.

This, and other courts, have held that similar sorts of statutory defenses are affirmative defenses. *Ingraham v. United States*, 808 F.2d 1075 (5th Cir. 1987) (the statutory cap on medical malpractice damages was an affirmative defense which was waived when not pled); *Brannan v. United Studen Aid Funds, Inc.*, 94 F.3rd 1260 (9th Cir. 1996) (the government actor exemption to the Federal Debt Collection Practices Act was an affirmative defense which was waived when not pled); *Freeman v. Chevron Oil Co.*, 517 F.2d 201 (5th Cir. 1975) (workers compensation was an affirmative defense which was waived when not pled); *Pitts v.*

Pine Mountain Ranch, Inc., 589 P.2d 767 (Utah 1978) (Utah Code Anno. 78-13-1(1) specifying jurisdiction for real property actions could not be raised after default was taken).

Pickett's no-fault defense was an affirmative defense. Once he was defaulted that defense was stricken. Any evidence as to that defense was evidence as to liability and not as to damages and was appropriately not considered by the trial court.

IV

PICKETT STIPULATED TO THE EVIDENCE

At the beginning of the trial of this matter the parties presented the court a book of exhibits which they had previously complied and which they stipulated would be admitted and used by the court in trying the damages issues. (Record at pages 22 and 23). The trial court accepted that stipulation and used the exhibits in issuing its findings of fact, conclusions of law and judgment. In Utah evidence which is otherwise not admissible may be admitted and considered if the parties stipulate to its admission. *State v. Abel*, 600 P.2d 994, 998 (Utah, 1979); *State v. Collins*, 612 P.2d 775 (Utah, 1980); *State v. Jenkins*, 523 P.2d 1232 (Utah, 1974); *State v. Rowley*, 15 Utah 2d 4, 386 P.2d 126 (1963). Because Pickett stipulated to the admission of the exhibit book the court was entitled to consider all the evidence contained in the book.

V

PICKETT HAS NOT MARSHALED THE EVIDENCE

To successfully challenge a trial court's findings, an appellant must first **marshal all the evidence** that supports the trial court's findings. After marshaling the supporting evidence, the appellant then must show that, even when viewing the evidence in a light most favorable to the trial court's ruling, the evidence is insufficient to support the trial court's findings." *State v. Gamblin*, 2000 UT 44, P17 n.2, 1 P.3d 1108; *In re Pendleton*, 2000 UT 77, 11 P.3d 284, note 6.

Pickett lists a few of the facts supporting the judgment and then argues they were insufficient. Armstrongs invite the court to compare Pickett's Addendum, small excerpts of the evidence at trial, to theirs, all the evidence considered below. Pickett asks this court to look at the facts that supports his position and reweigh the evidence on that basis. Pickett's exercise before this court fails for the reason described by this court at note 6 of *Child v. Gonda*, 972 P.2d 425 (Utah 1998)

> [I]f nine eyewitnesses testify that the stop light was red and one eyewitness testifies that it was green, the jury may choose to believe the one eyewitness. The fact that the jury chose to believe the one instead of the nine is not enough to establish that the verdict was "'completely lacking or so slight and unconvincing as to make the verdict plainly unreasonable and unjust.

The trial court is entitled to the same deference.

Pickett's efforts to marshal the evidence in this matter fail in that they, by themselves, show that there is sufficient evidence to support the trial court's findings and therefore the judgments. When the evidence Pickett omitted is added it is clear that the trial court's determination must be upheld.

VI

ARMSTRONGS MET THE NO-FAULT THRESHOLD

Notwithstanding the fact that Appellants Dan and Jared Armstrong did not need to meet the no-fault threshold because Pickett's pleadings had been stricken they met the threshold nonetheless.

A

JARED ARMSTRONG'S SCARS

1

THE SCARS ARE DISFIGURING

Pickett argues that Jared Armstrong's scars are not sufficiently disfiguring to meet the no-fault threshold set by Utah Code Anno. 31A-22-309(1)(d). Pickett does cite a standard for determining which scars are disfiguring and which are not. Black's Law Dictionary defines disfigurement as "an impairment or injury to the appearance of a person or thing." 480 (7th ed. 1999). Webster's New Twentieth Century Dictionary defines disfigurement as, "2. **anything** that disfigures or defaces;

blemish; defect; deformity." [emphasis added] Jared and his mother both described the scars as disfiguring.

The evidence at trial, on the scars, was as follows. In the collision Jared Armstrong's face was cut. (Record at 578, page/line 31/3). Jared underwent plastic surgery in an attempt to remove those scars. (Appendix at Tab F, bate stamp no. 135-140, 180-185). A photograph of Jared's scars, after the surgery, was admitted at trial and shows that they remain. (Appendix at Tab F, bate stamp no. 148). Jared's scars are noticed by other people. (Record at 578, page/line 73/18). The scars clearly disfigure and meet the no-fault threshold.

2

PICKETT ACKNOWLEDGED AT TRIAL THAT THE SCARS MET THE THRESHOLD

In his opening statement at trial Pickett did not take the position that Jared's scars did not meet the no-fault threshold. Instead, at trial, (Record at 578, page/line 12/12), Pickett's counsel discussed Jared's scars with the court. There he said "That the two boys, that this claim, I guess there's a question on whether or not Taylor has a permanent impairment, permanent injury, but they both received scarring and under the threshold requirements a permanent disfigurement is, I guess, then through the threshold."

Further during colloquy with the court on the no-fault issue

counsel again did not argue that Jared's scars did not meet the no-fault threshold. At that point he only made that argument as to Dan's injuries. (Record at 578, page/line 16/11). Rather than tell the court that Jared's scars were not permanently disfiguring within the purview of the code he acknowledged that they were.

Later in closing argument Pickett could have raised the no-fault defense but did not. There, rather than argue that Jared's injuries were not sufficiently serious to meet the no-fault threshold Pickett merely argued that Jared could not recover the sums which had already been paid by PIP. "We don't dispute that Jared's medical expenses were $2,778.78. That amount, however, was all paid for by the PIP carrier that we discussed earlier. We don't believe he's entitled to recover those amounts again in this action." (Record at 578, page/line 96/14-18).

Before the trial court Pickett did not argue that Jared's scars did not meet the no-fault threshold. He cannot raise the failure to meet the threshold argument now.

B

DAN ARMSTRONG'S INJURIES ARE PERMANENT

The evidence at trial on Dan Armstrong's injuries was as follows. In the collision Dan Armstrong was struck in the lower back. (Record at 578, page/line 30/22-24). Mr. Armstrong had

suffered an injury to his back in a prior motor vehicle accident. (Record at 578, page/line 31/25-32/2). The prior damage to his back was exacerbated by the collision at issue in this case. As a result of the prior injury Dan awoke at 3:30 a.m. to 4:00 a.m. After the Pickett collision he started to wake up at 2:00 a.m. The pain lasted longer and was more frequent. (Record at 578, page/line 31/17). Before the Pickett collision Dan need to exercise 2-3 times a week to resolve the pain in his back. (Record at 578, page/line 32/15). After the Pickett collision he has to do the exercises everyday and his back still flares up. (Record at 578, page/line 33/18). Further, he now has to do additional exercises to keep the pain under control. (Record at 578, page/line 34/6). If he doesn't do the exercises he has severe pain which he attributes to the accident. (Record at 578, page/line 34/17). At work Mr. Armstrong has to get up and move around after sitting for one and a half to two hours. He didn't have to get up and move around before the Pickett collision. (Record at 578, page/line 35/12). Over all he can't do the things he does as well as he did before the collision. (Record at 578, page/line 35/18). Mr. Armstrong was referred for an MRI by his family physician, Scott Smith, for complaints of lower back pain. That scan was performed November 18, 1997. (Appendix at Tab D, bate stamp no. 104; Tab E, bate stamp no. 110). As a

result of his back problems his chiropractor recommended that Dan get an orthopedic chair. (Appendix at exhibit 5.) Dan's total medical expenses arising from the Pickett collision were at least $3823.00. (Appendix at exhibit 3).

While Dan Armstrong did not have a physician testify that he suffered a specific percentage impairment of the whole man as is often seen in personal injury trials there was nonetheless objective testimony of his permanent impairment. The trial was held almost four years following the collision. At that time Dan Armstrong was still experiencing pain and limitation from the collision. That is evidence of a permanent impairment.

Pickett argues that Dr. Smith's chart on Dan did not show any evidence of complaints of back pain arising from the accident. However evidence at trial showed that there were omissions in Dr. Smith's chart. Dan's medical records showed that he had been referred by Dr. Smith for an MRI because of pain in his lower back which had persisted since the collision even though there was no reference in Dr. Smith's records of that MRI referral. The radiology report confirmed damage to Dan's back. (Appendix at Tab D, bate stamp no. 103) (Record at 578, page/line 60/24-61/5). While this may not be as much evidence a Pickett would have liked it was nonetheless a preponderance in the trial court's mind.

VII

THE EVIDENCE SUPPORTS THE INDIVIDUAL JUDGMENTS

A

THE TAYLOR ARMSTRONG PERSONAL INJURY JUDGMENT

Pickett argues that this court should revisit the judgment awarded Taylor Armstrong. Armstrongs' version of the facts show Taylor suffering a significant loss in his verbal abilities as a result of Pickett's driving while he was drunk. That means that not only will Taylor not be able to read for the sake of enjoyment he will not be able to obtain the more lucrative types of employment where reading is a central skill. Dr. Bigler's description was that the injury is the type which has "monumental consequences." The trial court obviously believed Armstrongs' version of the facts. Having believed that version of the facts a verdict for $350,000.00 in general damages is not inordinately high. It may be low.

B

THE JARED ARMSTRONG PERSONAL INJURY JUDGMENT

Armstrongs' version of Jared's injuries is that they embarrass him and they are permanent. Again, it is apparent the trial court accepted Armstrongs' version. The fact that Jared will be embarassed by those scars for the next 50 years supports a verdict for $10,000.00 in general damages.

C

THE DANIEL ARMSTRONG PERSONAL INJURY JUDGMENT

The Armstrongs' version of Dan's injuries is that they cause him pain daily and restrict his ability to make a living. Again, it is apparent the trial court accepted Armstrongs' version. The fact that Dan will be called upon to suffer from this collision for the rest of his life supports a verdict for $10,000.00 in general damages.

D

THE DANIEL ARMSTRONG PROPERTY JUDGMENT

Pickett argues that the trial court could not award Dan Armstrong a judgment for damage to the Suburban because he had put it in his wife's name. This argument ignores the reality of modern life and Utah law. The evidence showed that, even though the vehicle was titled in Lorene Armstrong's name all of the receipts for improvements and work on the car were in Dan's name. Lorene is a party to this suit, acting as the guardian ad litem for her minor sons. Pickett's insurance company didn't quibble about the title when they made a partial payment for the loss.

Utah law provides that Dan has a sufficient interest in the Suburban to allow him to sue for its loss. The Suburban was marital property. Marital property encompasses all of the assets of every nature possessed by the parties, whenever obtained and

from whatever source derived. *Marsh v. Marsh,* 1999 UT App 14 ¶19, 973 P.2d 988. Dan Armstrong suffered a loss when the Suburban was destroyed whether it was in his name or not. The trial court appropriately awarded him a judgment for its loss.

VIII

COUNSEL MUST SHOW PROOF THAT THEY HAVE AUTHORITY TO APPEAR

After this action was filed Armstrongs filed a motion under Utah Code Anno. 78-51-33 to require counsel to prove that they had authority to appear on Pickett's behalf. That motion was based on the fact that Pickett had failed to appear for his deposition and at trial. (Record at 578, page 1). Counsel never did provide any documentation from Pickett showing authority nor did they "prove by [their] own oath" that they had that authority. Instead they relied upon the fact that they had been hired by Pickett's insurance company and that was sufficient authorization.

The fact that Pickett refused to appear for his deposition or for trial is a clear indication that he did not want to be involved in this matter further. Without authorization, counsel should not be allowed to proceed on his behalf.

CONCLUSION

The trial court properly exercised its discretion in the trial of this matter. Each of the trial court's findings of fact

and conclusions of law are adequately supported by the record. The judgments awarded are proper. Pickett is entitled to an offset for sums previously paid by his insurance company for the total loss of the Armstrongs' vehicle. Similarly he is entitled to an offset for sums paid by the Armstrongs' carrier for PIP as Armstrongs acknowledged at trial. This appeal should be dismissed, the judgments awarded by the trial court affirmed and the Armstrongs awarded their costs.

Dated this 13th day of December, 2001.

Robert H. Wilde
Attorney for Appellees

ADDENDUM

The Armstrongs' Addendum is bound separately and filed herewith.

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Appellees Brief was mailed to the following via first class mail, postage prepaid thereon, this 13th day of December, 2001.

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